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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 568.

INTERNATIO-ROTTERDAM, INC.,
Petitioner,

against

RIVER BRAND RICE MILLS, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI.

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Statement.

Plaintiff-petitioner, Internatio-Rotterdam, Inc., in a trial conducted in the United States District Court for the Southern District of New York, without a jury, sought $68,400 from the defendant-respondent, River Brand Rice Mills, Inc., claiming such amount as damages for the defendant-respondent's failure to deliver 45,000 pockets of rice in Houston, Texas.

At the close of the plaintiff-petitioner's case, the District Judge rendered a detailed opinion in which he dismissed the plaintiff-petitioner's action. In essence, the District Court determined that the defendant-respondent's non-delivery of rice in Texas was justified by plaintiff-petitioner's failure to perform the conditions specified in the contract and that

there was no basis for the estoppel, waiver, and election theories asserted by the plaintiff-petitioner as excuses for its non-performance.

On appeal, the Court of Appeals for the Second Circuit unanimously upheld the District Court's decision in every respect.

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254. The judgment of the Court of Appeals was entered on September 12, 1958. This petition was served upon respondent on December 9, 1958 and filed in this Court on December 10, 1958.

Opinions of the Courts Below.

The opinion of the District Court is not reported.

The opinion of the Court of Appeals for the Second Circuit is reported at 259 F. 2nd 137.

Both opinions are attached, as an appendix, to petitioner's application.

Questions Presented.

All of the questions presented involve the interpretation of a sales contract under the law of Texas, and the determination under such law, of the respective rights and obligations of the parties following the buyer's conceded default in complying with a provision of the contract regarding the giving of shipping instructions.

The questions are:

1. Under the terms of the contract, and in view of the surrounding facts and circumstances, was the petitioner's

conceded failure to give shipping instructions, in the manner and time specified in the contract "trivial" as asserted by petition, or, as asserted by respondent, (a) the non-performance of a condition precedent to the respondent's delivery obligations and (b) the breach of a material term of the buyer's contractual obligations justifying the respondent's refusal to deliver?

2. Under the terms of the contract, and in view of the surrounding facts and circumstances, was the respondent's delivery of the portion of the rice required to be delivered in Lake Charles (where proper and timely shipping instructions had been given), a forfeiture of respondent's right to refuse to deliver the remaining portion in Houston (where timely and proper shipping instructions had not been given)?

Reasons Why the Writ Should Be Denied.

The petitioner asserts three basic reasons why this Court should grant certiorari: (1) conflict between the Court of Appeals' decision in this case with "applicable state law," • • • "the law of Texas" (Petition p. 4); (2) conflict of such decision with the decisions of "other federal courts" (Petition p. 4); and (3) "to settle important questions of commercial law, which have been *un*settled by the decision herein of the Court of Appeals" (Petition p. 4, Italics petitioner's).

We shall deal with these assertions in order below.

1. **Claimed Conflict with State Law.** It is believed that the petitioner has the duty, on this application, to designate clearly the state case or statutory law which is claimed to be in conflict with the decision of the Court of Appeals from which further appeal is sought. Yet the petitioner here has failed completely to specify a single Texas case or

statute with which such conflict is claimed to exist. Indeed, petitioner's sole mention of any Texas authorities is a brief attempt to distinguish (Petition pp. 13-14) two of the Texas decisions cited by the Court of Appeals (App. p. 30). Furthermore, petitioner does not suggest that such decisions are in conflict with the decision of the Court of Appeals, but merely that it is petitioner's view that they do not "assist" respondent (Petition p. 13) and are distinguishable (Petition p. 14). The petitioner's general assertion that the Court of Appeals' decision conflicts with Texas law is impossible to reconcile with its opposite, and equally emphatic, claim that no "explicit" decision exists in the United States on the "question as to the effect of delay in the taking delivery of and paying for the goods." (Petition p. 5). It is submitted that the petitioner on this application has not established that the decision of the Court of Appeals conflicts in any way with any case or statutory Texas law.

2. **Claimed Conflict with "Other Federal Courts".** The petitioner claims that:

> ". . . the Court's treatment of punctual delivery as 'of the essence' of *both* parties duties under the contract conflicts with the decision of the Court of Appeals for the Fourth Circuit in *LeRoy Dyal* v. *Allen*, 161 F. 2nd 152" (Petition p. 16, Italics petitioner's).

In the *Dyal* case, the Court of Appeals for the Fourth Circuit found that the seller had breached a contract for the sale of potatoes by shipping them a few days too early and by providing inspection certificates that were improperly dated a few days prior to the shipment. The Court found, however, that such breaches were immaterial to the buyer and had caused him no damage and hence held that

the buyer could not terminate his contract. The Court expressly stated that surrounding circumstances furnished the guide to the Court in determining whether the failure to perform, at the time fixed in the contract, relieves the other contracting party from his contractual obligation. (161 F. 2d at p. 155)

In similar manner, the Court of Appeals and the District Court in this case carefully examined the surrounding circumstances presented and unanimously found that, under such circumstances, the seller was relieved of its delivery obligations because of the nature of the buyer's breach. It is thus clear that the respective holdings of the two Courts of Appeals were not based on the application of different rules of law but simply upon the different factual situations presented.

It should also be noted that the Court of Appeals in the *Dyal* case was not dealing with the common law of Texas but with a reparation order under a federal statute regulating the shipment of perishable commodities in interstate commerce, i.e., the Perishable Agricultural Commodities Act. It is submitted that even if the Court of Appeals for the Fourth Circuit had applied a rule of law under such federal statute, different from the Texas rule of law applied by the Court in this case, no conflict on the same matter would have existed under Rule 19.1.(b) of the rules of this Court since each jurisdiction might properly have had an independent basis for a different rule of law.

3. **Claimed "Unsettlement" of Important Questions of Commercial Law.** Disregarding its other contradictory assertions that state and federal decisions exist which conflict with the Court of Appeals' decision in this case, the petitioner urges, on this aspect of its petition, that the effect of a buyer's default is an open question in the United

States and suggests that this case "affords this Court an opportunity . . . to settle fundamental and important questions of commercial law" (Petition p. 19). Thus, the petitioner claims that, while the effect of delay in shipment of goods in commerce was settled years ago by this Court's decision in the case of *Norrington* v. *Wright,* (1885) 115 U. S. 188, "equally explicit decisions do not exist in the United States . . . as to the effect of delay in taking delivery of and paying for the goods" (Petition p. 5). The petitioner also states that "no reason is apparent why similar interest should not be inherent in the question here presented" (Petition p. 5).

The answers to petitioner's claims are two fold.

(a) In 1885, when the *Norrington* case was decided, this Court directly reviewed, by writ of error, the judgments of the circuit court, the trial court. Today, such review is performed by the Courts of Appeal created since such decision. (See, Frankfurter and Landis, The Business of the Supreme Court pp. 86-102) If present appellate procedures had been in effect in 1885, it is believed that this Court would not have granted a second appeal to determine a private commercial controversy such as was involved in the *Norrington* case.

In this case the petitioner has had appellate review and the case is not of the "imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court" as specified in Rule 20 of the rules of this Court.

(b) The petitioner poses the issues in this case as if they involve principles of international importance. While conceding that the law of Texas is "the applicable law" (Petition p. 4), petitioner presents no Texas statutory or case authorities, but is content to limit its discussion to

a brief effort to distinguish some of the Texas authorities cited by the Court of Appeals. The petitioner has devoted the bulk of its discussion to authorities of jurisdictions other than Texas, disregarding the fact that many such jurisdictions, unlike Texas, have adopted statutes like the Uniform Sales Act which modify the common law in many respects. Certainly, it is clear that, whatever legal issues are involved in this action, they relate to ascertaining the local law of Texas and not laws of international effect. It would not appear to be the function of this Court, as petitioner seems to claim, to attempt to "settle" or "unsettle" the law of Texas or any other local jurisdiction.

Nor did the Court of Appeals' decision in this case "settle" or "unsettle" any "important questions of commercial law" as petitioner contends (Petition p. 4). The decisions of the District Court and the Court of Appeals make it clear that the issues involved depended upon the application of long established principles of law to a complicated set of facts. At the trial, the petitioner conceded its breach of contract but urged that such breach was "trivial" and that, in consequence, the respondent's remedy should be limited to damages and should not include the remedy of termination. Respondent urged that its refusal to deliver was justified because the petitioner's breach was of an essential term of the contract and because it constituted a failure of a condition precedent to respondent's obligations.

Neither the District Court nor the Court of Appeals made any summary disposition of this case. Both made a careful review of the surrounding facts and circumstances disclosed by the 8 witnesses and the texts of the 90 exhibits that were offered in evidence before reaching the conclusion that the petitioner's breach was indeed of a term "of the essence" to the respondent and the non-performance of

a condition precedent to the respondent's delivery obligations. The decisions of both Courts were based upon the following principal facts which attested to the importance of the petitioner's giving timely shipping instructions to the respondent:

1. The contract related to rice, a commodity of fluctuating value (A 16, 31-32). No error is claimed by the petitioner in either the District Court's or Court of Appeals' express findings on this issue.

2. The contract was not based upon the petitioner's credit but upon an irrevocable letter of credit issued by a bank. Petitioner conceded and the Court found (A 17, 32) that such letter of credit became useless unless documentary proof was tendered to the bank of delivery to a dock in December (A 3, 32).

3. Two weeks' shipping instructions were considered to be a "reasonable" period of call (A 15, 18, 29-30) to which respondent was entitled even without a specific contract stipulation providing for such two weeks' call (A 15, 18, 29-30).

4. The necessity for compliance with the contract stipulations with respect to shipping instructions were of particular importance to the respondent in view of the substantial quantities of rice involved (A 20), the fact that respondent was at the peak of its rice season (A 16, 17, 22, 31), the fact that December was known to be a period of congestion in the Port of Houston (A 3, 7) and the fact that petitioner had been warned in advance by its own agents that cancellation for late shipping instructions were occurring in the industry (A 7).

In summary, it would appear clear that no fundamental question of international commercial law or policy has

been "settled" or "unsettled" by the decision of the Court of Appeals in this case. On the basis of well established rules of contract law and under the facts and circumstances presented in this case, the petitioner has been found to have been guilty of a breach of a term of a contract that was of the "essence" to the respondent and the non-performance of a condition precedent to the respondent's delivery obligations which fully justified the respondent in refusing to make the disputed delivery.

The petitioner poses a second issue which also does not involve any unique question of law necessitating settlement by this Court. Applying the law of Texas, the Court of Appeals held (A 34) that the portion of the contract deliverable by the respondent in Lake Charles was not "indivisible" from the delivery to be made in Houston as contended by petitioner, and that the parties "duties as to shipment as to each port were paired and reciprocal and that performance by the parties at Lake Charles did not preclude the appellee's right of cancellation." (A 35). The District Court also found that the respondent's delivery in Lake Charles had been launched on the basis of false information furnished by the petitioner (A 25) and was not a "bargained situation in which the defendant voluntarily participated in any sense" (A 25).

Conclusion.

The Writ of Certiorari should be denied.

Respectfully submitted,

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